INDEX

CITATIONS

Cases:

768-355—65——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

HERBERT GUEST, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, ATHENS DIVISION

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 17–41) is not yet reported.

JURISDICTION

The judgment of the district court dismissing the indictment against appellees (App. B. *infra*, p. 42) was entered on January 8, 1965. A notice of appeal to this Court was filed on January 27, 1965. The jurisdiction of this Court to review the decision of the district court on direct appeal is conferred by 18 U.S.C. 3731. *United States* v. *Braverman*, 373 U.S. 405.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, in pertinent part, provides:

> SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.
>
> * * * * *
>
> SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

18 U.S.C. 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined no more than $5,000 or imprisoned not more than ten years or both.

QUESTIONS PRESENTED

1. Whether Section 241 of the Criminal Code reaches unofficial conspiracies against the exercise of rights secured by the Fourteenth Amendment.

2. Whether Section 241 reaches unofficial conspiracies against the exercise of rights secured by Title II of the Civil Rights Act of 1964, relating to places of public accommodation.

3. Whether Section 241 reaches unofficial conspiracies against the exercise of the right to freely enter and leave the State and the right to freely use the instrumentalities of interstate commerce.

STATEMENT

On October 16, 1964, the United States Grand Jury for the Middle District of Georgia returned an indictment charging six individuals with engaging in a criminal conspiracy in violation of 18 U.S.C. 241. None of the defendants was alleged to hold public office or to be acting "under color of law." The objects of the conspiracy were alleged to be—

> to injure, oppress, threaten and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia, in the free exercise and enjoyment by said Negro citizens of the following rights and privileges secured to them by the Constitution and the laws of the United States:
>
> 1. The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of motion picture theaters, restaurants, and other places of public accommodation;
>
> 2. The right to the full and equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof;

3. The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia;

4. The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia;

5. Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia.

The indictment particularized the means by which the conspirators planned to achieve their goal, which included beatings, shootings, killings, and other acts of violence against the persons and property of Negroes.[1]

The defendants moved to dismiss the indictment on the ground that it did not charge an offense under the laws of the United States. The district court sustained the motion and dismissed the indictment as to all defendants (App. B., *infra*, p. 42).

Following the court of appeals decision in *Williams* v. *United States*, 179 F. 2d 644 (C.A. 5), affirmed partly on other grounds, 341 U.S. 70, the district court held that 18 U.S.C. 241 does not punish an invasion of rights secured by the Fourteenth Amendment—the only rights alleged by the indictment, in the court's view (App. A, *infra*, pp. 20–33). That ruling made it unnecessary to separately consider the further question whether wholly private conspiracies directed at Fourteenth Amendment rights are within the constitutional reach of Section 241. Focusing on paragraph

[1] The full text of the indictment is reproduced in note 1 of the opinion below (App. A, *infra*, pp. 18–19).

4 of the indictment—which alleges interference with interstate travel and the use of interstate facilities (*supra*, p. 4)—the district court concluded that no right of national citizenship was there stated (App. A, *infra*, pp. 33–35). And it likewise rejected the contention that Titles II (public accommodations) and III (public facilities) of the Civil Rights Act of 1964 created federal rights that might be vindicated by a criminal prosecution under 18 U.S.C. 241 (App. A, *infra*, pp. 35–37).[2]

THE QUESTIONS ARE SUBSTANTIAL

Terrorism, intimidation and reprisal directed at American citizens because they are members of the Negro race asserting their federal constitutional and statutory rights are national concerns properly invoking national action. One hundred years ago, in somewhat comparable circumstances, the Congress responded by declaring it a crime against the United States to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." The Fourteenth Amendment itself had accorded the Negro a right to the equal utilization of public facilities owned or operated by the State. In 1964, the Congress confirmed the federal character of the constitutional priv-

[2] The district court also ruled that paragraph 5 of the indictment (alluding to "other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia") was so vague and indefinite as to "contribute nothing toward the validity of the indictment" (App. A, *infra*, p. 35). We acquiesced in that ruling below and do not challenge it here.

ilege and added a right to the equal enjoyment of the advantages of privately owned places of public accommodation. Yet, it is now held that a violent conspiracy against those very rights is no offense against the United States—at least when (as is normally to be expected) the conspirators are not public officials. We challenge that ruling. Its reversal would enable the federal government to give important protection to civil rights. Furthermore, until this Court definitively resolves the constitutional and statutory questions now presented, neither the Executive nor the Congress can determine the need for new remedies or the appropriate solution.

There can be no dispute about the importance of the broad issue of the over-all reach of Section 241—the only federal statute that severely punishes invasions of civil rights by force and violence, and the only provision that punishes in any degree unofficial conspiracies so directed. The subsidiary questions presented here are, for that reason alone, of great significance. Some of them, moreover, have an independent importance. It remains only to show that their resolution below is not so clearly correct as to foreclose further argument.

1. The first question is whether Section 241 reaches unofficial conspiracies directed at blocking the exercise of specific rights secured by the Fourteenth Amendment. At the threshold is the contention—upheld below—that Section 241 does not encompass Fourteenth Amendment rights at all. That question was left unresolved by an evenly divided Court in *United States* v. *Williams,* 341 U.S. 70, and is now

before the Court in *United States* v. *Price,* Nos. 948 and 949, this Term. For the reasons stated by Mr. Justice Douglas for four members of the Court in *Williams* (see 341 U.S. at 90–93) and in our jurisdictional statement in *Price* (see pp. 6–7), we believe rights secured by the Fourteenth and Fifteenth Amendments are within the scope of Section 241. The further question here—assuming Fourteenth Amendment rights are encompassed—is whether the provision reaches private action designed to defeat the implementation of such rights.

There can be no doubt but that the drafters of Section 241 meant to punish unofficial conspiracies directed at the newly declared rights of Negro citizens. It is enough to remember that the provision had its "source * * * in the doings of the Ku Klux and the like," as Mr. Justice Holmes noted for the Court in *United States* v. *Mosley,* 238 U.S. 383, 387. And, of course—once it is established that a right declared by the Fourteenth Amendment is a "right or privilege secured * * * by the Constitution" within the provision—the language of Section 241 is plainly broad enough to cover wholly private conspiracies: the crime may be committed by any "two or more persons," whether or not holding public office or acting "under color of law." *Ex Parte Yarbrough,* 110 U.S. 651; *United States* v. *Waddell,* 112 U.S. 76; *Logan* v. *United States,* 144 U.S. 263; *In re Quarles,* 158 U.S. 532; *Motes* v. *United States,* 178 U.S. 458; see *United States* v. *Classic,* 313 U.S. 299, 315. The root question, then, is whether the statute, so construed, overreaches the constitutional power of Con-

gress because the Fourteenth Amendment is in terms addressed to the States alone.

We think not. The Fifth Section of the Fourteenth Amendment, it seems to us, authorized all measures which are necessary and proper to "enforce" Section 1. This comprehends the punishment of violence aimed at terrorizing the beneficiaries of the Amendment out of asserting the rights there declared. To deny legislative power to deal effectively with such conspiracies is to reduce the guarantees of the Fourteenth Amendment (and the Fifteenth, also) to empty exhortations whenever unofficial pressures are interposed between the citizen and his State government, which preserves its clean hands, unable or unwilling to interfere. That situation was too familiar to those who wrote the post-Civil War Amendments to suppose that they conferred upon Congress no power whatever to deal with so obvious a barrier to the practical implementation of the newly established constitutional rights.

Two points deserve emphasis. First, nothing we suggest here remotely trenches on the principle announced in the *Civil Rights Cases,* 109 U.S. 3, that the Fourteenth Amendment does not reach purely private racial discrimination. Our immediate focus, to be sure, is on unofficial action. But that is only a matter of remedy: the substantive rights protected are rights *against the State,* in the classical sense of the Fourteenth Amendment. Our submission is that the Amendment authorizes the imposition of a penalty on those who seek by violence to defeat equality before the law.

The second reservation is equally important: Our construction of Section 241 would not convert every assault on a Negro into a federal crime, nor even every such assault prompted by racial prejudice. Violence alone is outside Section 241. We say only that violence specifically intended to prevent the enjoyment of particular constitutional rights by a class of citizens is within the reach of the section.[8] The requirement of a clear and direct connection between the acts condemned and the rights frustrated circumscribes the scope of the provision. Equivocal conduct remotely related to loosely defined constitutional rights is perhaps beyond federal jurisdiction. See *United States* v. *Cruikshank,* 92 U.S. 542; *United States* v. *Harris,* 106 U.S. 629; *Hodges* v. *United States,* 203 U.S. 1. The attempt to reach so far by a criminal statute might, in any event, fail for undue vagueness. See *Screws* v. *United States,* 325 U.S. 91. But no such problems are involved here. The present charge is that deliberate acts of violence were committed for the explicit purpose of terrorizing, on account of their race alone, an identifiable class of persons and thus to prevent them from asserting the specific and indisputable right to enjoy the benefit of public facilities owned or operated by the State—a right expressly declared by repeated decisions of this Court and recently recognized by the Congress as

[8] For example, the beating of a Negro is normally an offense only against the State, just as the beating of a white man, even if the motive was racial hostility. But the beating of a Negro parent to dissuade him from entering his child in a nominally desegregated public school would fall within the scope of Section 241.

properly invoking federal action for its enforcement. See Civil Rights Act of 1964, Title III (78 Stat. 246), authorizing the Attorney General to vindicate the right by civil proceedings. Such a case, we urge, falls within the power of Congress to punish under the Fifth Section of the Fourteenth Amendment.

2. We turn to the allegation of the indictment that the conspiracy was directed, in part, to intimidate Negroes out of exercising their right to enjoy, equally with others, the advantages of privately owned places of public accommodation. Whether or not it has an independent source in the Equal Protection Clause of the Fourteenth Amendment (see *Bell* v. *Maryland*, 378 U.S. 226, 245–255 (opinion of Mr. Justice Douglas), 286–318 (opinion of Mr. Justice Goldberg), 326–343 (opinion of Mr. Justice Black)), the right involved is expressly declared by Title II of the Civil Rights Act of 1964,[4] which implements the Com-

[4] Perhaps the indictment should have explicitly alleged that the places of public accommodation referred to are subject to the Act. The implication is clear from the wording of the relevant paragraph ("motion picture theatres, restaurants and other places of public accommodation"), which borrows the terminology of Title II. Moreover, it is difficult to conceive of a restaurant that is not a covered establishment. See *Katzenbach* v. *McClung*, 379 U.S. 294, 298, 301–305; *Hamm* v. *Rock Hill*, 379 U.S. 306, 309–310. And, plainly, all motion picture theatres in Athens, Georgia, are covered. See § 201(c)(3) of the Act (78 Stat. 243). Of course, at trial, the government must show that the conspirators sought to prevent Negroes from asserting their right to enter, or be served at, establishments covered by the Act. The indictment, we submit, fairly apprises them of the charge. In any event, no such pleading objection was raised or noticed below and the question is probably not open on this direct appeal.

The court below did point to a wholly different omission, in

merce Clause. See *Atlanta Motel* v. *United States*, 379 U.S. 241. As a right "that flow[s] from the substantive powers of the Federal Government," it is one of the "federally created rights" that, everyone agrees, "may clearly be protected from private interference." *United States* v. *Williams*, 341 U.S. 70, 78 (opinion of Mr. Justice Frankfurter); *United States* v. *Waddell*, 112 U.S. 76. Thus, even under the most restrictive view of its scope, Section 241 would seem to reach a private conspiracy directed against the right to nondiscriminatory treatment in places of public accommodations. But, though there is no constitutional obstacle, it is argued that Congress has deliberately foreclosed that result by providing in the statute creating the right that it shall be enforced only by equitable proceedings.

The contention is premised on the following declaration in Section 207(b) of the Act (78 Stat. 246): "The remedies provided in this title [*i.e.*, equitable remedies] shall be the exclusive means of enforcing the rights based on this title." No doubt,

---

alleging a violation of Title II rights, which it deemed serious. That is the failure to define the right to the equal advantages of privately owned places of public accommodation as an exemption from "discrimination or segregation on the ground of race, color, religion, or national origin." See Appendix A, *infra*, pp. 32–33. The objection, it seems to us, is without merit in light of the general allegation in the opening paragraph of the indictment—which qualifies all that follows—that the conspiracy was directed at Negroes, to deter Negroes (the same and others, presumably) from exercising their rights. See *supra*, p. 3. It is a mere quibble to suggest that the defendants were not sufficiently informed that they were charged with a conspiracy against Negroes as Negroes and not as individuals.

that provision bars both damage suits and criminal prosecutions in some situations. As Senator Humphrey noted in the congressional debates, a restaurant owner denying service in the erroneous belief that his establishment is not covered by the Act was not meant to be exposed to criminal prosecution under 18 U.S.C. 241 or 242. 110 Cong. Rec. (daily ed.) 9462. Indeed, it is doubtful if that case would, in any event, be within the reach of the criminal law. See *Screws* v. *United States, supra; United States* v. *Williams, supra,* 341 U.S. at 93–94 (opinion of Mr. Justice Douglas, dissenting). But, cf. *Guinn* v. *United States,* 238 U.S. 347. We may assume that the 1964 Act also proscribes criminal prosecution for a knowingly unjustified denial of service, which, though unaccompanied by violence of any kind, would otherwise subject a group of operators to the penalties of Section 241. See *United States* v. *Mosley,* 238 U.S. 383. But it does not follow that those who engage in a conspiracy of violence designed to terrorize Negroes so that they will not even attempt to assert their right to service at clearly covered places of public accommodation are likewise immunized from the federal criminal law. That result is so startling that we should not impute it to the congressional purpose unless the text plainly compels it.

Terrorists, unconnected with any establishment, are plainly in a different posture from the owner of a particular restaurant who merely fails to accord nondiscriminatory service; punishing them does something more than "enforce" the "rights created by" Title II. There are aggravating elements here that

more urgently call for criminal sanctions. By definition, there is a conspiracy, involving a number of persons with a broader purpose and a greater capacity for harm than the manager of a single establishment. Nor are the conspirators simply denying service; they are engaged in threats, intimidation and reprisal—dangerous and violent conduct. Unlike the owner, they are acting from malice; they are not responding to community pressures or fears of economic loss. And, of course, in their case, honest doubts about Title II coverage are not involved. In short, the policy behind the law's benevolent exemption from criminal liability and the delays granted to owners and operators is inapplicable to outsiders engaged in a conspiracy of terror.[5]

The Civil Rights Act of 1964 created a new federal right to nondiscriminatory treatment in places of public accommodation and provided for its direct enforcement by equity. Congress, to be sure, declined to make it a crime to peaceably deny the right. Yet the Act did create a new civil right and its provisions should not be construed to suspend the general law punishing forcible conspiracies against the assertion of the newly won right. In this application,

[5] To be sure, Sections 203 and 204 of the Civil Rights Act of 1964 (78 Stat. 244) provide for injunctive relief against those who "intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or * * * punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202." But that remedy—directed against substantive acts, rather than conspiracies—is wholly insufficient for a case like the present.

Section 241 is an "other Federal * * * law not inconsistent with [Title II]" which Section 207(b) of the 1964 Act (78 Stat. 246), was not intended to render inoperative.

3. Finally, the indictment (in paragraph 4, *supra*, p. 4) charges a conspiracy to interfere with "[t]he right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia." Of course, these rights are guaranteed against unreasonable or discriminatory State obstruction by the Commerce Clause of the original Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See *Edwards* v. *California*, 314 U.S. 160; *Morgan* v. *Virginia*, 328 U.S. 373; *Williams* v. *Fears*, 179 U.S. 270, 274; *Gayle* v. *Browder*, 352 U.S. 903, affirming 142 F. Supp. 707. Cf. *Kent* v. *Dulles*, 357 U.S. 116, 125–127; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505–506. We submit, however, that the rights described are also privileges of national citizenship—"federal rights"—which are secured by the Constitution against private interference. See *Crandall* v. *Nevada*, 6 Wall. 35, 43–44; *Twining* v. *New Jersey*, 211 U.S. 78, 97; *Edwards* v. *California*, 314 U.S. 160, 177 (concurring opinion of Mr. Justice Douglas); *United States* v. *U.S. Klans*, 194 F. Supp. 897 (M.D. Ala.); *United States* v. *Lassiter*, 203 F. Supp. 20 (W.D. La.), affirmed, 371 U.S. 10. Cf. *In re Debs*, 158 U.S. 564.[6]

[6] See, also, *New York* v. *O'Neill*, 359 U.S. 1, 7 (opinion of the Court), 12–14 (opinion of Mr. Justice Douglas); *Bell* v. *Maryland*, 378 U.S. 226, 249–255 (opinion of Mr. Justice Douglas), 293–294 and n. 10 (opinion of Mr. Justice Goldberg).

As such, they can be vindicated by a prosecution under Section 241, even accepting the most restrictive view of that enactment. See *Williams* v. *United States*, 341 U.S. 70, 78 (opinion of Mr. Justice Frankfurter).

CONCLUSION

For the foregoing reasons, we respectfully submit that probable jurisdiction should be noted and the case set down for plenary consideration.

ARCHIBALD COX,
Solicitor General.
JOHN DOAR,
Acting Assistant Attorney General.
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.
HAROLD H. GREENE,
HOWARD A. GLICKSTEIN,
Attorneys.

MARCH 1965.

APPENDIX A

In the United States District Court for the Middle District of Georgia, Athens Division

Criminal No. 2232

UNITED STATES OF AMERICA

v.

HERBERT GUEST, JAMES SPERGEON LACKEY, CECIL WILLIAM MYERS, DENVER WILLIS PHILLIPS, JOSEPH HOWARD SIMS, GEORGE HAMPTON TURNER

BOOTLE, District Judge:

For decision now are the defendants' motions to dismiss the indictment on the ground that it does not charge an offense under the laws of the United States.[1] A study of the question thus raised necessitates reference to some significant historical facts and a careful consideration of a few important Constitutional principles.

First, it must be noted that our Federal Government is a Government of limited powers, limited in number though not in degree. It can pinpoint its birth on the calendar. There was the ineffectual attempt under the Articles of Confederation. Then, there was the gloriously successful genesis under the Constitution. While the Federal Government is supreme in its sphere, its sphere is circumscribed. Its every power stems from a written instrument, the

Constitution, or does not exist. It is that Constitution and the laws made in pursuance thereof that constitute the supreme law of the land.

Secondly, it must be remembered that federal courts are courts of limited jurisdiction. This necessarily follows from the fact that the Federal Government, under which these courts are created, is a Government

---

[1] The indictment reads:

THE GRAND JURY CHARGES:

"Commencing on or about January 1, 1964, and continuing to the date of this indictment, HERBERT GUEST, JAMES SPERGEON LACKEY, CECIL WILLIAM MYERS, DENVER WILLIS PHILLIPS, JOSEPH HOWARD SIMS, AND GEORGE HAMPTON TURNER, did within the Middle District of Georgia, Athens Division, conspire together, with each other, and with other persons to the Grand Jury unknown, to injure, oppress, threaten and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia, in the free exercise and enjoyment by said Negro citizens of the following rights and privileges secured to them by the Constitution and the laws of the United States;

"1. The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of motion picture theaters, restaurants, and other places of public accommodation.

"2. The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof;

"3. The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia;

"4. The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia;

"5. Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia;

"It was a part of the plan and purpose of the conspi-

of limited powers. The federal courts have only such powers, only such jurisdiction as is conferred upon them by valid acts of Congress. There is no such thing as federal common law criminal jurisdiction. When a prosecution is brought against any person in a federal court, that person is entitled to ask under what valid act of Congress he is charged. The defendants so inquire by these motions to dismiss.

Thirdly, we should remember that any statute seeking to proscribe human conduct, making criminal that which but for the statute would be unpunishable in the court where such statute is sought to be enforced, must specifically describe the conduct denounced. This is elementary in the concept of due process of law, a principle applicable to the Federal Government under the Fifth Amendment, as well as to the States under the Fourteenth.

What is being said here is not new. On many occasions courts have measured indictments like this one against the principles above mentioned. There

---

racy that its objects be achieved by various means, including the following:

"1. By shooting Negroes;

"2. By beating Negroes;

"3. By killing Negroes;

"4. By damaging and destroying property of Negroes;

"5. By pursuing Negroes in automobiles and threatening them with guns;

"6. By making telephone calls to Negroes to threaten their lives, property, and persons, and by making such threats in person;

"7. By going in disguise on the highway and on the premises of other persons;

"8. By causing the arrest of Nergoes by means of false reports that such Negroes had committed criminal acts; and

"9. By burning crosses at night in public view.

"All in violation of Section 241, Title 18, United States Code."

has not been found any authoritative decision which this court can construe as going so far as to hold this indictment valid.[2] On the contrary, both of the two courts whose decisions are binding upon this court have fairly recently rendered decisions which this court construes as clearly invalidating this indictment.

The statute upon which the Government relies originated as Section 6 of the Act of May 31, 1870, 16 Stat. 140. It subsequently and successively became known as Section 5508 of the Revised Statutes of 1874–1878, Section 19 of the Criminal Code of 1909, and 18 U.S.C.A. § 51, 1926 edition, and is presently 18 U.S.C.A. § 241, 1948 edition, which reads as follows:

> "Conspiracy against rights of citizens.
>
> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> "If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> "They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

Now nearly ninety-five years old, this statute has been construed by the courts on several occasions. We now have it upon the authority of the court of appeals for the Fifth Circuit, and upon the authority of the Supreme Court that this statute was never intended by the Congress to embrace, and therefore does not

[2] The few early decisions to the contrary are rejected by the Supreme Court in footnote 8 in *United States* v. *Williams*, 341 U.S. 70, 81.

embrace, the Fourteenth Amendment rights. *Williams* v. *United States*, 179 F. 2d 644 (5th Cir. 1950); *Powe* v. *United States*, 109 F. 2d 147 (5th Cir. 1940); *United States* v. *Williams*, 341 U.S. 70, 95 L. ed 758 (1951). The precise holding of the court of appeals on this point in the *Williams* case in a clear, analytical and forceful opinion by Judge Sibley, concurred in by Judge Waller, Judge Holmes Dissenting, was:

> "In the conspiracy provision (section 241) the Congress had in mind the federal rights and privileges which appertain to citizens as such and not the general rights extended to all persons by the clause of the Fourteenth Amendment. The citizen's rights are specifically stated in the Constitution and statutes, and in them may be found a standard of conduct. Such was the case in *United States* v. *Classic*, 313 U.S. 299, 61 S. Ct. 1031, 85 L. ed. 1368, when the right of the citizen to vote for a Congressman was involved. *Ex parte Yarborough*, 110 U.S. 651, 4 S. Ct. 152, 28 L. Ed. 274, like the Classic case, involved the right of a citizen to vote. The Fifteenth and not the Fourteenth Amendment was rested upon. We are of the opinion that this provision on Sec. 19 (section 241) was not intended to include rights under the due process clause of the Fourteenth Amendment secured not to citizens only, but to everyone."

That holding of the court of appeals was affirmed by the Supreme Court in an equally clear and convincing opinion by Mr. Justice Frankfurter, who wrote,

> "we agree that § 241 * * * does not reach the conduct laid as an offense in the prosecution here. This is not because we deny the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment; nor is it because we fully accept the course of

> reasoning of the court below. We base our decision on the history of § 241, its text and context, the statutory framework in which it stands, its practical and judicial application—controlling elements in construing a federal criminal provision that affects the wise adjustment between State responsibility and national control of essentially local affairs. The elements all converge in one direction. They lead us to hold that § 241 only covers conduct which interferes with rights arising from the substantive powers of the Federal Government."

In the *Williams* case both the court of appeals and Supreme Court made a detailed study of § 241 and also of its companion statute, § 242, which consecutively has been section 2 of the Act of April 9, 1866, 14 Stat. 27, section 17 of the Act of May 31, 1870, 16 Stat. 144, section 5510 of the Revised Statutes of 1874–1878, section 20 of the Criminal Code of 1909, 35 Stat. 1092, 18 U.S.C.A. § 52, 1925 edition, and now 18 U.S.C.A. § 242, 1948 edition. Attached to the opinion of the Supreme Court is a comparative table showing the successive phraseology of these two statutes.

The differences in these two Code sections are succinctly pointed out by Judge Sibley, at page 647, as follows:

> "Sec. 19 (now 241) differs much from Sec. 20 (now 242), though both have to do with federally secured rights. Sec. 20 (now 242) creates a misdemeanor offense; it speaks of color of law, and of 'inhabitant of any State', and of discrimination in punishment on account of alienage or color or race. It punishes acts. Sec. 19 (now 241) punishes only conspiracy; it makes no reference to Sec. 20 (now 242), or to color of law, or to State, or to race or color; it adds also a separate and independent crime, the act of two or more persons going in disguise on the highway or premises of an-

> other with the bad intent named; and the punishment is that of felony, and ineligibility to hold office. Wilfulness is not mentioned, nor is 'intent' in the defining of the crime of conspiracy. It does not protect 'inhabitants', but only 'any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.'"

And the Supreme Court concluded:

> "All the evidence points to the same conclusion: that § 241 applies only to interference with rights which arise from the relation of the victim and the Federal Government, and not to interference by State officers with rights which the Federal Government merely guarantees from abridgement by the States." P. 81.

Actually, the court of appeals and the Supreme Court went further in the *Williams* case than we are called upon to go in this case because the indictment in the *Williams* case charged that the defendants acted under color of State law, thus incorporating the sometimes magical words from § 242. Nevertheless, the § 242 one year misdemeanor could not thus be converted into a § 241 ten year felony. The Court said:

> "the validity of a conviction under § 241 depends upon the scope of that section, which cannot be expanded by the draftsman of an indictment."

The indictment in the case at bar contains not the slightest suggestion of State action, the color of law ingredient necessary under § 242.[3] It would be hard

[3] There was a series of prosecutions which have become known as "the Williams cases". One indictment was under § 241. The conviction under that indictment is the subject matter of *Williams* v. *United States*, 179 F. 2d 644 (5th Cir. 1950) and *United States* v. *Williams*, 341 U.S. 70, above cited.

to imagine that Congress intended that these two sections of the same Act of 1870 apply to and cover the same rights because as Judge Sibley wrote:

> "It would certainly be strange that in the same Act of 1870 the Congress should punish the *consummated* deprivation of rights by such acts as are here charged only when wilfully done, and only as a misdemeanor (under 242); but should punish as a ten year felony with deprivation of the power to hold federal office, the bare conspiring to do such a thing though not wilfully, and with nothing more in fact done."

The indictment in that case charged in substance that the defendants acting under the laws of the State of Florida conspired to injure a citizen of the United States and of Florida in the free exercise and enjoyment of the rights and privileges secured to him and protected by the Fourteenth Amendment, to-wit, the right not to be deprived of liberty without due process of law; the right to be secure in his person while in the custody of the State of Florida; and to be immune from illegal assault and battery while in the custody of persons acting under color of the laws of Florida by persons exercising the authority of the State of Florida, and the right to be tried and punished, if guilty, by due process of law under the laws of Florida. Three of the defendants, including Williams, were alleged to have, and have conspired to use, authority under the State of Florida. It was the conviction under that indictment which the court of appeals and the Supreme Court set aside for the reasons above stated.

Williams was also convicted under an indictment drawn under § 242, it being established that he acted under color of law and the trial court having applied to § 242 the interpretation, with emphasis upon the word "wilfully", as required by the Supreme Court decision in *Screws* v. *United States*, 325 U.S. 91, 89 L. ed. 1495 (1945). That conviction was dealt with and affirmed in *Williams* v. *United States*, 179 F. 2d 656 (5th Cir. 1950), and *Williams* v. *United States*, 341 U.S. 97, 95 L. ed. 774 (1951).

A third case dealt with perjury, and is reported as *United States* v. *Williams*, 93 F. Supp. 922 (S.D. Fla. 1950) and *United States* v. *Williams*, 341 U.S. 58, 95 L. ed. 747 (1951).

The inclusion of the element of conspiracy in § 241 would hardly account for an increase of nine years in the maximum punishment when we remember that the general offense of conspiracy, until recently, carried only a two year maximum sentence. Nor would the presence of the requirement of State action in § 242 and its absence in § 241 reasonably account for the more severe penalty against private defendants and the less severe penalty against those acting under color of law. When Congress enacted the Civil Rights Act of March 1, 1875, entitled "An Act to Protect All Citizens in Their Civil and Legal Rights" held unconstitutional in the Civil Rights Cases, 109 U.S. 2, 27 L. ed. 835 (1883), thus undertaking to protect Fourteenth Amendment rights generally, it prescribed as punishment forfeiture of $500 to the person aggrieved, a fine of not more than $1,000, and imprisonment ranging from 30 days to one year.

As the Supreme Court pointed out, to construe § 241 as embracing Fourteenth Amendment rights generally rather than the rights of federal citizens as such would be not only a new, but a distorting, construction of an old statute making for redundancy and confusion, and if we assume that the conspiracy is under color of State law it can be reached under § 242 with the aid of the general conspiracy statute. Under the construction of § 241, contended for by the Government in the *Williams* case and in the case at bar, any conduct punishable under § 242 with the aid of the general conspiracy statute would also be punishable under § 241, and any conduct punishable under § 241, would also be punishable under § 242 with the aid of the general conspiracy statute if we add only the element of acting under color of State law, and this notwithstanding the vast difference in the maximum punishments prescribed. Criminal statutes "must be

strictly construed." *Prussian* v. *United States*, 282 U.S. 675, 677, 75 L. ed. 610, 612 (1931). "An ambiguity in such a statute is not to be resolved by an interpretation 'to embrace offenses not clearly within the law.'" *Merrill* v. *United States*, —— F. 2d —— (5th Cir. Nov. 24, 1964). See also *Krichman* v. *United States*, 256 U.S. 363, 367–368, 65 L. ed. 992 (1921). Any doubt must be resolved against broadening the scope of a criminal statute. *United States* v. *Adielizzio*, 77 F. 2d 841, 844 (7th Cir. 1935).

The Supreme Court, in the *Williams* case, buttressed its decision with an exhaustive review of its prior holding pointing out that these decisions had established that the rights which § 241 protects from individual action are those federal rights which arise from relationship of the individual and the Federal Government, for instance, the right to vote in general elections for Congressmen, *Ex parte Yarborough*, 110 U.S. 651, 28 L. 2d. 274 (1884), *Guinn* v. *United States*, 238 U.S. 347, 59 L. ed. 1340 (1915), *United States* v. *Mosley*, 238 U.S. 383, 59 L. ed. 1355 (1915), *United States* v. *Saylor*, 322 U.S. 385, 88 L. ed. 1341 (1944); the right to vote in Louisiana primary elections for Congressmen, *United States* v. *Classic*, 313 U.S. 299, 85 L. ed. 1368 (1941); the right to establish a claim under the Homestead Acts, this being a right "wholly" dependent upon an Act of Congress, *United States* v. *Waddell*, 112 U.S. 76, 28 L. ed. 673 (1884); the right of citizens in custody of a United States Marshal to be free from assault, *Logan* v. *United States*, 144 U.S. 263, 36 L. ed. 429 (1892), and the right to inform on violations of federal laws, *In Re Quarles*, 158 U.S. 532, 39 L. ed. 1080 (1895), *Motes* v. *United States*, 178 U.S. 458, 44 L. ed. 1150 (1900): and pointing out further that rights, albeit federal rights, which do not arise from the relationship of the individual to

the Federal Government and which arise only by reason of the Fourteenth Amendment's guaranty of protection against action by or on behalf of the States are not covered by § 242, for instance, *United States v. Cruikshank*, 92 U.S. 542, 23 L. ed. 588 (1876), where the defendants under the 4th and 12th counts were charged with having violated § 241, their charged intent being to prevent and hinder citizens of African descent and persons of color in "the free exercise and enjoyment of their several right [sic] and privilege [sic] to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens", and where the court said:

> "The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guaran-

> ties [sic] but no more. The power of the National Government is limited to the enforcement of this guaranty."

In the *Williams* case the Supreme Court also relied upon the following cases: *Hodges* v. *United States*, 203 U.S. 1, 18, 51 L. ed. 65 (1906), holding that the United States has no jurisdiction under the Thirteenth Amendment or under § 241 of a charge of conspiracy by individuals not under color of law to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor and that the effect of the War Amendments was to abolish slavery and to make the emancipated slaves citizens, not wards of the nation, the nation "believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes," and holding further that "they (members of the African race) took no more from the Amendment (13th) than any other citizen of the United States; *United States* v. *Wheeler*, 254 U.S. 281, 65 L. ed. 271 (1920), holding that a conspiracy by individuals not under color of law to deprive citizens of the United States of their right to remain in a particular state by seizing them and deporting them to another state, is not a violation of § 241, and that the privilege of passing from state to state is not an attribute of national citizenship, but is one of those privileges which belong by right to the citizens of all free governments distinguishing on the latter point the earlier cases, *Crandall* v. *Nevada*, 6 Wall. 35, 18 L. ed. 745 (and *Twining* v. *New Jersey*, 211 U.S. 78, 97, 53 L. ed. 97, 105; *United States* v. *Powell*, 212 U.S. 564, 53 L. ed. 653, affirming Per Curiam *United States* v. *Powell*, 151 Fed. 648, holding that participants in a mob which seized a Negro

from the custody of a local sheriff and lynched him were not indictable under § 241 (see *United States* v. *Williams,* 341 U.S. 70, 95 L. ed. 758); and *Baldwin* v. *Franks,* 120 U.S. 678, 30 L. ed. 766, holding that a conspiracy to drive *aliens* from their homes is not an offense under § 241, since it is expressly limited to interference with *citizens.*

Of particular interest to this court is the fact pointed out by Mr. Justice Frankfurter in Footnote 8 to the *Williams* case that the indictment in the famous case of *Screws* v. *United States,* 325 U.S. 91, 89 L. ed. 1495, which originated in this court, contained three counts, count 1 laying a charge under § 241, count 2, under § 242, and count 3, under § 242 in connection with the general conspiracy statute. Count 1 was very much like the indictment at bar, except that it identified two of its three defendants as state officers and went on to charge that these two officers and the third defendant did conspire to injure and oppress a named Negro citizen of the United States and an inhabitant of the State of Georgia in the free exercise and enjoyment of rights, privileges and immunities secured to said Negro citizen by the Constitution and the laws of the United States, to-wit, the right to be secure in his person and to be immune from illegal assault and battery; the right and privilege not to be deprived of liberty and life without due process of law; the right and privilege not to be denied equal protection of the law; the right and privilege not to be subjected to different punishments, pains and penalties by reason of his race and color than are prescribed for the punishment of other citizens; the right and privilege to be tried upon the charge for which he had been arrested by due process of law and, if found guilty, to be sentenced and punished in accordance with the laws

of the State of Georgia; all of said rights, privileges and immunities being secured to the said Negro citizen by the Fourteenth Amendment to the Constitution of the United States as against any person vested with and acting under the authority of the State of Georgia; and then set out the plan and purpose by which the objectives of the conspiracy were to be accomplished. The defendants filed a motion to dismiss or quash each of the three counts, and Judge Bascom S. Deaver signed a memorandum opinion overruling the motions as to counts 2 and 3, but sustaining the motion as to count 1, saying: "section 51 (now 241), as construed by this court was not intended to cover a transaction such as is alleged in the first count." It is significant that the Government did not challenge that ruling as to count 1, although under the Criminal Appeals Act of 1907, 18 U.S.C.A. § 3731, the Government could have secured a review in the Supreme Court. The Government's failure to appeal Judge Deaver's ruling is consistent with its concession in its brief filed in *Hodges* v. *United States, supra,* and quoted in the decision of said case at page 18, which concession, after referring to certain decisions of the Supreme Court, said:

> "Within these decisions, and many others that might be cited, before us, it is vain to contend that the Federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens.
>
> "Even though such right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the State.
>
> "Unless, therefore, the additional element to

> wit, the infliction of an injury upon one individual citizen by another, solely on account of his color, be sufficient ground to redress such injury the individual citizen suffering such injury must be left for redress of his grievance to the state laws."

Indeed, the failure to appeal Judge Deaver's ruling is of added significance because Count 1 of the *Screws* indictment alleged that among the rights of which the Negro citizen was to be deprived was "the right and privilege not to be denied equal protection of the laws; the right and privilege not to be subjected to different punishment, pains and penalties by reason of his race and color than are prescribed for the punishment of other citizens."

Two decisions regarding the rights of citizens in reference to labor organizations are of interest and are consistent with the views here expressed. In *United States* v. *Moore*, 129 Fed. 630 (Circuit Court, N.D. Ala., S.D., 1904), it is held that the right of miners to organize is not a right or privilege coming within § 241, and that the enforcement of such right depends entirely upon the statute. The case of *United States* v. *Bailes*, 120 F. Supp. 614 (S.D. W. Va. 1954), brings that holding up to date, applying it to the right of citizens to refrain from joining a labor organization even though the National Labor Relations Act, a statute tracing the validity to the Commerce Clause of the Constitution, secures such right as against employers, labor unions, and agents. These cases recognize that these rights of citizens to join or not to join labor organizations are fundamental rights of citizens in all free governments, and the *Bailes* case recognizes the fact that such rights, even though recognized by an Act of Congress, do not become rights of a citizen of the United States as such. See also *United States* v. *Berke Cake Co.*, 50

F. Supp. 311, E.D. N.Y. (1943), rejecting the Government's attempt to bring within the scope of § 241 the rights of employees recognized by the Fair Labor Standards Act, which, of course, traces its validity to the Commerce Clause.

This court is convinced that the five numerical paragraphs of rights and privileges set forth in this indictment are not federal citizenship rights and privileges; not "federal rights and privileges which appertain to citizens as such", 179 F. 2d at 648, and do not come within the scope of § 241, but are rights and privileges which are in their nature fundamental, and which belong of right to all citizens of all free governments, and which have belonged to all the free citizens of the several states ever since those states became free, independent and sovereign. For a discussion of these fundamental rights and privileges, see *Corfield* v. *Coryell*, 4 Wash. C.C. 371, and the *Slaughter-House cases*, 16 Wall. 36, 76, 83 U.S. 36, 76, 21 L. ed. 394, 408. Insofar as said five paragraphs of rights and privileges embrace the right to be free from discrimination by reason of race or color, such rights are Fourteenth Amendment rights, which, as we have seen, are not encompassed by § 241. The Government contends that the rights enumerated in paragraph 1 stem from Title 2 of the Civil Rights Act of 1964, and thus automatically come within the purview of § 241. The Government conceded on oral argument that paragraph one would add nothing to the indictment absent the Act. It is not clear how the rights mentioned in paragraph one can be said to come from the Act because § 201(a), upon which the draftsman doubtless relied, lists the essential element "without discrimination or segregation on the ground of race, color, religion, or national origin." This element is omitted from paragraph one of the in-

dictment, and does not appear in the charging part of the indictment. The Supreme Court said in *Cruikshank, supra,* at page 556, where deprivation of right to vote was involved,

> "We may suspect that 'race' was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense and cannot be supplied by implication. Everything essential must be charged positively, not inferentially. The defect here is not in form, but in substance."

The contention as to the rights and privileges specified in paragraphs 2 through 5 is that they are derived from the Fourteenth Amendment, and may be vindicated by prosecutions under § 241. As we have previously seen, this does not follow. Additionally, the Government contends that the rights and privileges set forth in paragraphs 2 and 3 are derived from Title 3 of the Act dealing with public facilities and that the right and privilege described in paragraph 4 is a right arising from the substantive powers of the Federal Government and thus falls within the protection of § 241. We think it clearly appears from the authorities above cited that tracing a right or privilege to the Fourteenth Amendment does not entitle it to coverage under § 241. We think it clear also that the right asserted in paragraph 4 to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of the State in interstate commerce within the State of Georgia is not an attribute of national citizenship. See *Wheeler* v. *United States, supra.* Travel rights including free ingress to a State and egress therefrom are rights inherent in citizens of all free governments including citizens of all the States and the States have full authority to punish violations of this fundamental right. *United States* v. *Wheeler, supra,* at

293. These rights were not created, or granted, by the Federal Constitution. Article IV of the Articles of Confederation recognized these rights as belonging to the "free citizens in the several states" and stipulated that "the people of each State shall have free ingress and regress to and from any other State * * *." Article IV, sec. 2 of the Constitution "plainly intended to preserve and enforce the limitation as to discrimination imposed upon the States by Article IV of the Articles of Confederation, and thus necessarily assumed the continued possession by the States of the reserved power to deal with free residence, ingress and egress * * *." *United States* v. *Wheeler, supra,* at 294. Thus, these ordinary and usual travel rights are not federal citizenship rights and do not become such by virtue of the exercise of the Congressional power to regulate interstate commerce under Article I, sec. 8, of the Constitution. Regulation is not tantamount to creation, and if it were the creation would be for inhabitants and citizens of states generally and not exclusively for citizens of the United States.

Similarly, as we have seen, the Fourteenth Amendment did not create, grant or secure federal citizenship rights. It broadened the base of citizenship. It increased the number of citizens. It did not increase the rights of State citizens or of federal citizens as against other citizens. It made citizens of those who had theretofore not been citizens. The post-bellum Amendments neither separately nor collectively made these new citizens wards of the Federal Government like the Indian tribes, for instance. The Supreme Court has said that members of the African race "took no more from the (13th) Amendment than any other citizen of the United States" and that the emancipated slaves were required by these Amendments to take "their chances with other

citizens in the States where they should make their homes." *Hodges* v. *United States*, 203 U.S. 1, 18–20, 51 L. ed. 65, 69–70 (1906). As pointed out by the Supreme Court in the *Cruikshank* case in 1876, "the equality of the rights of citizens is a principle of republicanism." Each State is duty bound to protect all its citizens in the enjoyment of this principle of the equality of rights. This right to equality is not a federally created, granted, or secured right. The Fourteenth Amendment merely grants a guaranty against denial of equal protection by the States, and the power of the Federal Government is limited to the enforcement of this guaranty. See *United States* v. *Cruikshank, supra,* at 554.

We feel certain also, as was conceded by the Government on oral argument, that paragraph 5 of the indictment referring to "other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia" contributes nothing toward the validity of the indictment because of the element of vagueness. This matter of vagueness will be discussed later.

Having decided that none of these rights and privileges are federal citizenship rights and privileges, that none of them appertain to federal citizenship as such, we need go no further. We are convinced, however, that the Civil Rights Act of 1964 in no way aids the prosecution. It seems crystal clear that the Congress in enacting the Civil Rights Act of 1964 did not intend to subject anyone to any possible criminal penalties except those specifically provided for in the Act itself. Throughout the Act are provisions for injunctive relief, including restraining orders and temporary and permanent injunctions. Section 1101, in part, reads:

> "In any proceeding for criminal contempt arising under title II, III, IV, V, VI, or VII of this Act, the accused, upon demand therefor,